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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	**CC Docket No. 93-22**
Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act	)))	**RM-7990**

COMMENTS OF
THE NATIONAL ASSOCIATION FOR INFORMATION SERVICES

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SUMMARY

The National Association for Information Services ("NAIS") submits the following comments regarding the Commission's proposals to implement the Telephone Disclosure and Dispute Resolution Act of 1992 ("TDDRA"):

Definition of Pay-Per-Call Services. The NAIS shares the Commission's view that presubscription arrangements, which are excluded from the definition of pay-per-call services, should encompass only those arrangements which are made prior to the initiation of a call. The Commission should also make it clear that presubscription arrangements may be written or oral as long as consumers are informed of all material terms and conditions at the time of presubscription. As an additional safeguard, providers of presubscribed services should be required to utilize personal access codes or some other means to restrict nonsubscribers from accessing their services.

Definition of Preexisting Agreements. The term "preexisting agreement" should be defined in virtually the same manner as the term "presubscription arrangement". The NAIS believes that its proposed definition of this term would address the concerns raised last year by the National Association of Attorneys General regarding the use of 800 numbers to access pay-per-call services.

Preamble Requirement. In view of the Commission's previous finding that preemption of state preamble requirements is required under Title I of the Communications Act, the Commission cannot now abandon its preemption policy unless the facts which supported its original preemption decision have changed. While there have been some advances in the delivery of real time call information since the FCC's original preamble rules were adopted, those advances do not justify a change in the Commission's preemption policy. Even if it were technically and economically feasible to segregate interstate from intrastate traffic for preamble purposes, the additional costs and burdens of attempting to comply with conflicting Federal and state laws would, in and of themselves, justify continued FCC preemption. Rather than deleting its preamble rule, as proposed, the Commission should instead adopt by reference the preamble rule to be promulgated by the FTC.

Designation of Pay-Per-Call Numbers. The Commission's proposal to designate the 900 service access code as the only code that may be used for pay-per-call services is too restrictive. Such a rule is not necessary to protect consumers and would needlessly stifle the development of new pay-per-call services. The Commission should permit the use of any number for pay-per-call services except 800 numbers or other numbers advertised or widely understood to be toll free.

Information Disclosure by Common Carriers. The information disclosures required under the Commission's existing rules, as supplemented by the TDDRA, are more than adequate to promote consumer awareness. Additional disclosures should not be required by the Commission.

Forgiveness of Charges and Refunds. The Commission's proposed rule regarding the forgiveness or refund of pay-per-call charges should be clarified in several respects. First, with regard to non-FCC matters, only adjudicated violations should trigger the forgiveness/refund requirement. Second, there should be some standard of materiality in determining whether a violation of law has occurred. Third, carriers should only be required to forgive charges or provide refunds upon demand. Finally, reasonable time limitations regarding a consumer's right to request a refund should be established.

Protection Against Non-Payment of Legitimate Charges. The NAIS supports the Commission's proposed rule which will explicitly permit carriers and information providers to block programs from telephone subscribers who do not pay legitimate pay-per-call charges. It would be premature, however, for the Commission to adopt a more detailed rule at this time.

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COMMENTS OF
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I. INTRODUCTION

The Telephone Disclosure and Dispute Resolution Act of 1992 ("the TDDRA" or "the Act")[1/] directs the Federal Communications Commission ("FCC" or "Commission") and the Federal Trade Commission ("FTC") to prescribe regulations governing the provision of pay-per-call services. On March 10, 1993, the FCC released the above-captioned Notice of Proposed Rulemaking and Notice of Inquiry ("Notice") seeking comments on its proposals to implement the TDDRA.

The National Association for Information Services ("the NAIS") is a Washington, D.C. based national trade association representing a wide range of U.S. and international companies engaged in the interactive telemedia industry, including pay-per-call. NAIS members include interexchange carriers, local exchange carriers, service bureaus, media and publishing companies, marketing companies and information providers.

[1/] Pub. L. No. 102-556, 106 Stat. 4181 (1992).

The NAIS has been an active and leading participant in every major pay-per-call legislative and regulatory proceeding at the Federal and state levels since 1990, including the FCC's 1991 pay-per-call rulemaking proceeding,[2] the legislative process leading to the passage of the TDDRA, and the current FCC and FTC rulemaking proceedings required by the TDDRA. In addition, the NAIS has worked hard to develop mutually constructive relationships with organizations such as the National Consumers League and the National Association of Attorneys General ("NAAG").

These Comments are the result of an extensive collaborative effort among a representative cross-section of our member companies, including Ameritech Services; AT&T; Audio Communications; Direct American Marketers; GTE; ICN Corporation; Interactive TeleMedia Services; International Telemedia Associates; LO/AD Communications; MCI Communications; NYNEX; Pacific Bell; Phone Programs, Inc.; Sprint TeleMedia; Tele-Lawyer, Inc.; Tele-Publishing, Inc.; The Travel Channel/The Weather Channel; and The USA Today Information Center. The proposed rules will have a significant impact on these companies. Thus, the NAIS has a vital stake in the outcome of this proceeding.

Several issues posed in the Notice (e.g., billing and collection policies, interruption of telephone services, recovery of costs, etc.) will be addressed by individual NAIS members in separate filings. The NAIS urges the Commission to consider carefully the comments filed by individual member companies; they are, after all, on the "front lines" of the interactive information business.

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[2] In Re Policies and Rules Concerning Interstate 900 Telecommunications Services, Report and Order, 6 FCC Rcd. 6166 (1991) ("1991 Report and Order").

II. DEFINITION OF PAY-PER-CALL SERVICES

The statutory definition of pay-per-call services, which the FCC proposes to adopt verbatim, excludes services for which users are assessed a fee "only after entering into a presubscription or comparable arrangement with the provider of such service."[3/] The Commission has expressed the view that presubscription arrangements should only encompass agreements made by subscribers prior to the initiation of a call.[4/] Comments have been requested on whether the term "presubscription arrangement" should be explicitly defined by rule and, if so, what that definition should be.

The NAIS shares the Commission's view that presubscription arrangements should encompass only those agreements which are made prior to the initiation of a call. One of the accepted definitions of the term "subscription" is "consent, agreement, approval, or support conveyed or such as would be conveyed by signed confirmation."[5/] Presubscription means that the approval or acceptance necessary to subscribe to a service must have occurred some time prior to the use of the service. Thus, the Commission's determination that presubscription arrangements must be made by subscribers prior to the initiation of a call seems reasonable.

The Commission should also make it clear that while presubscription agreements may be written, the use of a written contract is not the decisive factor in determining the validity of such agreements. Rather, the relevant inquiry should be whether the information provider can show that consumers were informed of, and agreed to, all

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3/ See 47 U.S.C. § 228(i)(2) and proposed FCC rule § 64.1501(b).

4/ See Notice at ¶ 8, note 5.

5/ Webster's Third New International Dictionary 2278 (1976).

material terms and conditions associated with a presubscribed service at the time of presubscription.[6] This approach is consistent with the Commission's prior conclusion in CC Docket No. 91-65 that presubscribed services, such as legal research services or other databases, should be excluded from the definition of pay-per-call services because consumers have "an adequate opportunity to obtain information about the costs and benefits of the service at the time of presubscription."[7]

As an additional safeguard, providers of presubscribed services should be required to utilize some type of mechanism (e.g., personal access codes) to restrict non-subscribers from accessing their services. This will help to ensure that only those consumers who are informed of the costs associated with a presubscribed service can use the service.

In sum, a service should be considered "presubscribed" if (i) the consumer is informed of all material terms and conditions of using the service at the time of presubscription; (ii) the consumer agrees to utilize the service under the terms and conditions specified by the service provider; and (iii) an access code or other mechanism is used to restrict nonsubscribers from accessing the service. The NAIS proposes that the Commission adopt the following definition of the term presubscription arrangement:

> Presubscription Arrangement means an agreement established prior to the initiation of a call to a service which would otherwise constitute a "pay-per-call service" in which (i) the

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[6] In deciding whether the material terms and conditions of a presubscribed service have been disclosed, the Commission should be guided by its existing preamble requirements. 47 C.F.R. § 64.711 (1992). Specifically, the consumer should be advised of (i) all per call or per minute fees; (ii) the name of the service provider; and (iii) the product or service offered.

[7] 1991 Report and Order at 6179.

service provider clearly and conspicuously discloses to the caller all material terms and conditions associated with the use of the service; (ii) the caller agrees to utilize the service on the terms and conditions disclosed by the service provider; and (iii) the service provider uses access codes or other means to prevent unauthorized access to the service by nonsubscribers.

It should be noted that the FTC has proposed its own definition of a "presubscription or comparable arrangement" because the term "has not been defined by statute or by the FCC."[8/] Once the FCC defines this term, the FTC should either delete or amend its definition to conform to the FCC's definition because the term relates to Title I of the TDDRA which is to be implemented by the FCC.

III. DEFINITION OF PREEXISTING AGREEMENT

The Commission has asked whether other terms crucial to the application of the TDDRA's requirements should be defined by rule.[9/] The term "preexisting agreement," which is used in connection with restrictions imposed on the use of 800 numbers,[10/] should be defined in a manner that is virtually identical to the term "presubscription agreement." Specifically, the NAIS proposes the following definition:

> Preexisting Agreement means an agreement established prior to the initiation of a call to a telephone number begin-

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8/ Federal Register, Vol. 58, No. 45, released March 10, 1993, 13370, 13372.

9/ Notice at ¶ 8.

10/ Proposed FCC rule § 64.1504(c) provides that: "Common carriers shall prohibit ... the use of any telephone number beginning with an 800 service access code, or any other telephone number advertised or widely understood to be toll free, in a manner that would result in ... (c) the calling party being charged for information conveyed during the call unless the calling party has a preexisting agreement to be charged for the information .... [Emphasis added].

ning with an 800 service access code, or any other telephone number advertised or widely understood to be toll free in which (i) the service provider clearly and conspicuously discloses to the caller all material terms and conditions associated with the use of the service; (ii) the caller agrees to utilize the service on the terms and conditions disclosed by the service provider; and (iii) the service provider uses access codes or other means to prevent unauthorized access to the service by nonsubscribers.

The NAIS believes that its proposed definition addresses the concerns expressed by NAAG in its Petition for Clarification and Modification which was filed with the FCC last year.[11/] In the Petition, NAAG asked the Commission to prohibit the use of 800 numbers for services which automatically bill callers through tone-generation technology, automatic number identification ("ANI") or billing detail information. Underlying NAAG's request was a concern that callers to such 800 numbers did not understand that a charge would be incurred and were "confused about whether they in fact had agreed to incur the charge."[12/] In this regard, NAAG stated that "[t]he use of an 800 number to provide a pay-per-call service where the caller is billed merely by staying on the line or inputting data through tone generation is inherently misleading."[13/]

The NAIS shares NAAG's concern. Accordingly, unless there is an appropriate credit card authorization, the NAIS' proposal would not allow consumers to be billed for services accessed through an 800 number unless the caller had agreed to be billed prior

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[11/] Petition for Clarification and Modification, CC Docket No. 91-65, filed April 30, 1992 ("Petition"); see also Petition for Clarification and Modification of Pay-Per-Call Rules filed by National Association of Attorneys General to be Treated as a Petition for Rule Making, RM-7990, 7 FCC Rcd 3390 (1993).

[12/] Petition at ¶ 6.

[13/] Petition at ¶ 9.

to calling the 800 number. Service providers could not obtain "on the spot" agreements from consumers to be charged for information provided during the course of an 800 number call. In addition, to ensure that consumers understand that charges will be incurred, the NAIS' proposal requires prior disclosure of all material terms and conditions of using the service including its cost.[14/]

IV. PREAMBLE REQUIREMENT

Pursuant to Section 64.711 of the FCC's existing rules, common carriers must ensure that preambles are included on all pay-per-call services. The TDDRA directs the FTC to promulgate its own preamble rule, a rule which will, in many respects, mirror Section 64.711. In the interest of avoiding duplication and possible confusion, the FCC has proposed to delete its preamble requirement:

> Since the FTC is required to adopt rules governing the content and operation of preambles to pay-per-call programs, retention of our preamble requirements would be duplicative and, possibly, confusing. [As a result], our separate preamble requirement is no longer necessary to protect consumers ....[15/]

Although the FCC may lawfully eliminate Section 64.711 in order to avoid duplication, the Commission may not lawfully eliminate its policy of preempting inconsistent state preamble regulations if the FTC does not adopt a similar preemption

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[14/] In its Petition, NAAG also asked the FCC to affirm that pay-per-call services that use 800 numbers must comply with the Commission's pay-per-call rules. This issue is moot. Under the TDDRA and the FCC's proposed rules, 800 numbers cannot be used to connect to pay-per-call services. See 47 U.S.C. § 228(c)(6) and proposed FCC rule § 64.1504.

[15/] Notice at ¶ 12.

policy. This is because, as shown below, the FCC already has held that Title I of the Communications Act requires preemption of state preamble regulations, and nothing in the TDDRA permits the FCC to ignore this holding. Indeed, the TDDRA constitutes Congressional affirmation that the public interest requires a nationally uniform regulatory policy governing preambles.

A. The TDDRA Does Not Alter The FCC's Federal Preemption Authority Under Title I Of The Communications Act.

When Section 64.711 of the Commission's rules was adopted in 1991, various state legislatures and public utility commissions had already adopted their own preamble requirements, some of which were inconsistent with each other and with the FCC's new rule. The Commission concluded that it must preempt such requirements because they would undermine the Commission's obligation under Title I of the Communications Act to "make available ... a rapid, efficient, Nation-wide communications service."[16/]

Specifically, the Commission found that it was necessary to exercise its Title I preemption authority because telephone carriers and information providers could not sort intrastate from interstate 900 traffic.[17/] The Commission also found that preemption was necessary to avoid undue confusion and expense:

[16/] 1991 Report & Order at 6180 citing 47 U.S.C. § 151.

[17/] Courts have upheld the authority of the FCC to preempt state regulation of intrastate communications where the intrastate and interstate aspects of a service are inseverable and state regulation would impede Federal policies. See Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 375 n. 4 (1986); Public Service Comm'n of Maryland v. F.C.C., 909 F.2d 1510, 1514-15 (D.C. Cir. 1990); People of State of Cal. v. F.C.C., 905 F.2d 1217 (9th Cir. 1990).

> [S]tate requirements that additional or different material be presented in the preambles for a pay-per-call service will present ... an obstacle to our Title I responsibilities ... . [C]onflicting or additional state requirements would cause undue confusion and expense to all parties .... [I]n the absence of the LECs', IXCs' or information providers' ability to identify intrastate 900 calls, effectuation of the state preamble requirement would necessarily require application of the state requirements to interstate 900 service.[18]

The TDDRA does not restrict or repeal the FCC's obligation under Title I of the Communications Act to preempt state preamble rules. Indeed, while the legislative history reflects Congress' intent not to prevent states from enacting and enforcing complementary systems and procedures, it is clear that the Commission's existing Title I preemption authority is preserved.

The Senate Report provides that "the States only have jurisdiction over intrastate 900 services, and many 900 services involve interstate calls. The FCC, rather than the States, has jurisdiction over interstate calls."[19] Similarly, the House Report provides that "[s]tates are not precluded from enacting and enforcing additional provisions to deal with intrastate audiotext services."[20]

The TDDRA itself explicitly provides that state regulation is permissible only to the extent that it does "not significantly impede the enforcement of this section or

[18] 1991 Report & Order at 6180-81.

[19] S. Rep. No. 190, 102d Cong., 1st Sess. 8 (1991).

[20] H.R. Rep. No. 430, 102d Cong., 2d Sess. 13 (1991) [Emphasis added].

other Federal statutes."[21] Clearly, Title I of the Communications Act is a Federal statute, the jurisdictional breadth of which the TDDRA does not change.

If anything, the TDDRA provides additional authority for the FCC to preempt state preamble requirements by specifically mandating continued FCC involvement in preamble regulation and by authorizing FCC preemption of state regulations that conflict with Federal requirements.

The TDDRA directs the FCC to "establish a system for oversight and regulation of pay-per-call services in order to provide for the protection of consumers in accordance with this Act and other applicable Federal statutes and regulations."[22] In granting this authority, Congress recognized the need for a nationally uniform regulatory framework to govern pay-per-call services:

> Audiotext services are inherently an interstate service, and nationwide uniform guidelines and enforcement are necessary to protect consumers inasmuch as no individual State can address the problems created by this industry.[23]

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[21] 47 U.S.C. § 228(g)(4). See also H.R. Rep. No. 430, 102d Cong., 2d Sess. 13 (1991).

[22] 47 U.S.C. § 228(b).

[23] H.R. Rep. No. 430, 102d Cong., 2d Sess. 9 (1991). The Senate Report acknowledged the "need for legislation at the Federal level to establish uniform standards for the industry, to ensure that consumers have sufficient information prior to calling 900 services, and to provide the FTC, FCC, and the States with the authority needed to protect consumers [sic.] interests." S. Rep. No. 190, 102d Cong., 1st Sess. 8 (1991). The House reached a similar conclusion stating that "the lack of nationally uniform guidelines led to confusion for consumers, audiotext providers, and common carriers, particularly as States individually addressed concerns with the abusive practices of pay-per-call businesses." H.R. Rep. No. 430, 102d Cong., 2d Sess. 13 (1991).

Consistent with these findings, Section 228(b)(1) of the TDDRA directs the FCC to adopt regulatory policies that "provide a consumer of pay-per-call services with adequate and clear descriptions of the rights of the caller." Section 228(c) makes non-compliance with the FTC's preamble rule a violation of the Communications Act and instructs the FCC to adopt regulations that put common carriers and information providers on notice of this fact. Section 228(g)(4) limits the exercise of state authority in this area to situations that "do not significantly impede the enforcement of [any FCC policy adopted pursuant to] this section or [pursuant to any] other Federal statutes." Thus, while the TDDRA directs the FTC to adopt its own preamble rules, the Act also mandates that the FCC is to play a continuing and active role in ensuring that carriers and information providers abide by those rules.[24/]

B. The Same Considerations Which Led The FCC To Exercise Its Preemption Authority In 1991 Require That It Maintain Its Preemption Policy Today.

In view of the FCC's previous finding that preemption of state preamble requirements is required under Title I of the Communications Act, the Commission cannot now abandon that policy unless it determines that the facts and circumstances which supported its original preemption decision have changed. Indeed, in the absence of such a determination, the Commission has an obligation to maintain its preemption policy for the reasons articulated in the 1991 Report & Order just 18 months ago.

[24/] It is noteworthy that nothing in the TDDRA requires the FCC to eliminate its preamble rule. The Commission has discretion to keep its rule in place, modify its rule to comport with the rule to be adopted by the FTC or incorporate the FTC's new rule by reference.

In the 1991 Report & Order, the Commission found that preemption of inconsistent or supplemental state preamble regulations was required because it was not economic for "carriers and information providers ... to develop and install technical means to identify inter- and intrastate traffic and apply different preambles."[25] This is still the situation today.

While there have been some technological advances in the delivery of real-time call information since the preamble rules were adopted in 1991, those advances are not significant enough to warrant a change in the Commission's preemption policy. AT&T and other interexchange carriers, for example, can offer real time ANI using ISDN and SS7 technology. However, relatively few customers actually use this service because of the significant hardware, software, installation and network configuration costs associated with the technology. The carriers also impose additional monthly and per call usage charges. As a result, only a handful of large service bureaus are equipped to offer the service.[26]

Even if the technical limitations discussed above did not exist, and they do, the Commission would still be required to exercise its preemption authority because of the confusion and expense which would be associated with multiple preamble requirements. Indeed, in the 1991 Report & Order the Commission explicitly stated that:

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[25] 1991 Report & Order at 6181.

[26] The Commission recently stated that information providers who subscribe to AT&T's Advanced Multiquest Feature (Area Code Routing) may be able to isolate intrastate from interstate 900 calls on a real-time basis. Order on Reconsideration, CC Docket No. 91-65, FCC 93-88, released March 10, 1993 at ¶ 28. While this feature can be used for a variety of purposes (e.g., to block all inbound intrastate calls or to block calls from certain areas of the country) it is not a particularly cost-effective or practical means of segregating interstate from intrastate traffic for preamble purposes.

> If different preambles could be applied to pay-per-call service [sic] that can be accessed on both an intrastate and interstate basis, the state requirements would result in wasteful and inefficient duplication of resources. The preamble requirement adopted herein is meant to establish a nation-wide standard for educating consumers about the nature of the call being placed, and conflicting or additional state requirements would cause undue confusion and expense to all parties.[27/]

The additional costs and burdens of attempting to comply with conflicting Federal and state preamble requirements would be enormous. Carriers and information providers would be subjected to a patchwork of preamble requirements from dozens of jurisdictions. This would require constant monitoring of changing state requirements, not to mention the need to reconfigure service bureau facilities, at considerable cost, to ensure that each pay-per-call program is prefaced by multiple preamble messages.

In view of the foregoing, the NAIS proposes that, rather than entirely deleting its own preamble regulation, the Commission adopt by reference those preamble regulations which are promulgated by the FTC. By taking this action, the Commission avoids any possible confusion over the applicable standards while clarifying that the Communications Act requires it to preempt any state imposed preamble requirements that stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress to "make available ... a rapid, efficient, Nation-wide ... communications service."[28/]

[27/] 1991 Report & Order at 6181 [Emphasis added].

[28/] 47 U.S.C. § 151.

V. DESIGNATION OF PAY-PER-CALL NUMBERS

The FCC has tentatively concluded that consumers' interests would be best served by designating the 900 service access code as the only code that may be used for interstate pay-per-call services.[29] This conclusion is based on the Commission's belief that most consumers are not likely to associate pay-per-call services with other numbers:

> A substantial number of telephone subscribers are probably aware that services offered through 900 numbers carry charges beyond those assessed for transmission of ordinary long distance calls. Subscribers are much less likely to associate other number sequences with the increased charges applicable to pay-per-call programs.[30]

The NAIS urges the Commission to reconsider its proposal. While the utilization of a single service access code may provide consumers with an easy way to identify pay-per-call services, such a restriction is not necessary to accomplish the Commission's ultimate objective -- consumer awareness -- because any service accessed through a non-900 number would have to comply with all of the FTC and FCC pay-per-call rules. That is, while a consumer might not immediately recognize a non-900 pay-per-call number, there is little risk that a call to the number will result in unexpected charges given the advertising, preamble and other disclosures mandated by the TDDRA.

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[29] Notice at ¶ 17. A pay-per-call service is defined in proposed FCC rule § 64.1501 (a) as "any service (1) in which any person provides ... audio information or audio entertainment ...; (2) for which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for the transmission of the call; and (3) which is accessed through the use of a 900 telephone number."

[30] Notice at ¶ 17.

The Commission's proposal may also unnecessarily hinder the development of new service applications and impede the continued growth and expansion of the pay-per-call industry. For example, just last week, a workshop sponsored by the Industry Carriers Compatibility Forum was held in Washington, D.C., under the auspices of the Carrier Liaison Committee of the Exchange Carriers Standards Association, to discuss a new service application utilizing the 555 central office code. Through the use of this code, it is anticipated that service providers will be able to offer information services on a local, regional or national basis. To access the service on a national basis, callers may only need to dial seven digits -- 555 followed by the four digit station number. The use of 555 and other abbreviated dialing mechanisms which are on the immediate horizon (e.g., N11) would be jeopardized if the Commission's proposed rule is implemented.

The NAIS believes that the public interest would be best served by the adoption of a rule which will provide carriers and information providers with as much flexibility as possible to meet changing needs and demands within the rapidly changing information services industry. Specifically, the NAIS suggests that proposed rule Section 64.1501(-a)(3) be revised to read as follows:

> (3) which is accessed through use of a 900 telephone number or any other number, except an 800 number or other number advertised or widely understood to be toll free, used to access an interstate service that satisfies the requirements of (1) and (2) above.

The NAIS proposal would permit any prefix to be used for a pay-per-call service, provided that the service is promoted and advertised in accordance with Federal pay-per-call rules, and provided further that no prefix commonly understood to be toll free is used. Adoption of this proposal would ensure that the Commission's rules do not stand in the way of new pay-per-call applications.

At a minimum, if the Commission decides not to modify its proposal, streamlined review procedures should be adopted. Specifically, the Commission should establish some mechanism which will permit expedited consideration of requests to utilize new prefixes for the provision of interstate pay-per-call services without the need to go through a formal rulemaking process which may take years.

VI. INFORMATION DISCLOSURE BY COMMON CARRIERS

Section 64.712 of the Commission's rules currently requires common carriers to provide, upon request and free of charge, the name, address, and customer service telephone number of the information providers they serve. The TDDRA imposes additional disclosure requirements upon common carriers.[31/] The Commission has asked whether carriers should be required to take steps beyond those required by the TDDRA.

The NAIS believes that the disclosures required under the Commission's existing rules, as supplemented by the TDDRA, are more than sufficient to promote consumer awareness. While carriers may elect voluntarily to provide supplemental disclosures, any additional, Federally mandated requirements would be repetitive, unnecessary and unduly burdensome.

[31/] 47 U.S.C. § 228(c)(2).

VII. FORGIVENESS OF CHARGES AND REFUNDS

Proposed rule Section 64.1511 requires that common carriers forgive pay-per-call charges or issue refunds when either the Commission or a carrier determines that a pay-per-call program has violated Federal pay-per-call regulations or any other Federal law. In situations where private billing and collection services are utilized, carriers must ensure, through tariff or contract provisions, that information providers and their billing agents have similar forgiveness and refund policies in place. The NAIS believes that this rule must be clarified in several important respects.

First, with respect to Federal requirements which are outside of the FCC's jurisdiction, the Commission should only consider matters which have been adjudicated as violations of Federal law. A matter should be considered "adjudicated" when the ultimate trier of fact renders its decision.[32] The ultimate trier of fact is a court or administrative body whose factual findings are not subject to de novo review.[33] Pending investigations, complaints and consent decrees should not constitute violations of law which would trigger the forgiveness/refund requirements of Section 64.1551. As the Commission has stated:

> Where that litigation has ended in a settlement agreement, consent decree, or acquittal and there is no admission or finding of unlawful misconduct, we believe it is generally inappropriate for us to reach

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[32] See, e.g., In Re Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service, Memorandum Opinion and Order on Reconsideration, CC Docket No. 90-358, FCC 93-139, released April 9, 1993 ("Cellular Order") at ¶ 6.

[33] See, e.g., Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1205 at n.62, recon. granted in part, denied in part, 1 FCC Rcd 421 (1986), appeal dismissed sub nom. National Association for Better Broadcasting v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987).

legal conclusions on the basis of any stipulated facts. The Commission generally does not have the expertise or resources to resolve believes that he or she is entitled to a refund, it should be incumbent upon that consumer to notify the carrier.

Finally, the Commission should establish some reasonable limitations on a consumer's right to demand a refund under Federal law. If such limits are not imposed, carriers would be left with potentially indefinite liabilities especially if the service provider is no longer in business. The NAIS suggests that it would be reasonable to require a forgiveness or refund request to be filed no later than 60 days after the adjudication of a Federal law violation. The 60-day time limit is consistent with the billing error correction procedure proposed by the FTC pursuant to the TDDRA[36/] which itself is patterned after the Fair Credit Billing Act process used to correct credit card billing errors.[37/]

VIII. PROTECTION AGAINST NONPAYMENT OF LEGITIMATE CHARGES

Proposed rule Section 64.1512 permits common carriers and information providers to block programs from subscribers who have incurred, but not paid, legitimate pay-per-call charges. The NAIS fully supports the adoption of this rule. Formal recognition of the need to control consumer abuse in the pay-per-call arena is long overdue.

The Commission has asked whether a more detailed rule is required. The NAIS believes that the adoption of a more detailed rule at this time would be unnecessary and counterproductive. The industry is working towards identifying procedures to protect service providers against subscribers who regularly do not pay legitimate pay-per-call

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36/ See Federal Register, Vol 58, No. 45, released March 10, 1993, at 13388.

37/ See 15 U.S.C. § 1666.

charges. For example, some local exchange companies, including Pacific Bell and GTE, automatically block subscribers from accessing pay-per-call programs once certain dollar thresholds are reached. Service bureaus and information providers are working on other ways to prevent abuse. Since blocking techniques are still being refined, it would be premature for the Commission to adopt more specific procedures at this juncture.

IX. CONCLUSION

There is clearly a need for uniform and reasonable regulations to guide the continued evolution and growth of the pay-per-call industry and to protect the interests of consumers. However, in crafting its regulations, the NAIS asks the Commission to recognize the business and consumer realities of today's pay-per-call industry, not yesterday's. While many of the FCC's proposals are a sensible outgrowth of the Commission's previous regulations and the requirements of the TDDRA, others are contrary to Congress' intent to provide uniformity and to foster the growth of new information services.

The final form and substance of the Commission's regulations will have a significant and very direct impact on the pay-per-call industry and the public. The NAIS looks forward to working closely with the Commission throughout this proceeding.